No. 434.

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JAMES H. MCKENNEY,
Clerk.

Brf. of Wheeler for Petitioner.

United States Supreme Court,

OCTOBER TERM, 1898.

Filed Oct. 28, 1898.

THE ATLAS STEAMSHIP COMPANY (Limited),
Petitioner,

vs.

THE STEAMSHIP "LA BOURGOGNE," her engines, &c.,
LA COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

BRIEF FOR THE PETITIONER.

EVERETT P. WHEELER,
Advocate for Petitioner.

Supreme Court of the United States,

OCTOBER TERM, 1898.

THE ATLAS STEAMSHIP COMPANY (LIMITED),
Petitioner,

versus

THE STEAMSHIP BOURGOGNE, her Engines, Tackle, Apparel and Furniture, etc. The COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Respondent.

Brief for Petitioner and Libellant.

STATEMENT.

This is a motion for a writ of Certiorari to review a decree of the Circuit Court of Appeals in the Second Circuit, which affirmed a decree of the District Court for the Southern District of New York.

The decision of the District Court is reported 76 Fed., 868 ; and of the Circuit Court of Appeals, 78 Fed., 475.

The libel was filed to recover damages for a collision in New York harbor, February 29, 1896, in which the steamship *Ailsa*, then lying in Grave

send Bay, and a little west of south from Fort Lafayette (on the eastern side of the Narrows), was sunk by the steamship *Bourgogne*. The fog at the time was so dense that a vessel could not be seen at a distance exceeding 150 feet.

An inspection of the map facing page 500 of the record "showing anchorage ground in the port of New York," will make the situation clear.

The undisputed facts in the case are set out in the petition. These are in a narrow compass. The length of the record is produced by conflicting testimony as to the place where the *Ailsa* was anchored ; and by cumulative testimony as to the vigilance of the *Bourgogne*.

Eliminating this the case presents only a few important questions of law.

These are succinctly presented by reference to the *Bourgogne's* answer (pp. 8, 9) :

"About thirteen minutes past one o'clock in the afternoon of Saturday, the 29th day of February, 1896, the said steamship *La Bourgogne* left her pier at the foot of Morton street, North river, in the city of New York, with a cargo of merchandise and a number of first, second and third-class passengers, bound on one of her regular voyages to Havre, and that after hauling out into the stream, she turned and straightened on her course down the river towards Sandy Hook. A heavy rain was falling, but the weather was otherwise sufficiently clear to afford a good view of vessels in the harbor and render navigation reasonably safe. The tide was ebb and a brisk wind was blowing from south southwest.*

La Bourgogne's navigation was under the direction of a duly licensed pilot stationed on the bridge with her commander and a full corps of officers, quarter-masters and specially trained seamen. Her second captain with two efficient look-outs were stationed forward at the bows, and a number of able seamen with a competent boat-

* This was in fact south south east (p. 304, fol. 1214 ; p. 306, fol. 1224).

swain were also on duty on the upper forward deck under the orders of the second captain, and all attentive to their respective duties. In these conditions, *La Bourgogne* proceeded down the channel without special incident or event until she passed Bay Ridge and approached the Narrows when the weather thickened, whereupon the engines were slowed and the whistle sounded at the intervals required by the regulations. The steamer thus proceeded until after she had passed Quarantine when she encountered a dense fog which shut out all view of Staten Island and vision ahead through the Narrows. The captain and pilot then concluded that it was unsafe to attempt to proceed to sea and decided to anchor the ship, but as they were in the Channel in the way of passing vessels it was decided necessary to drop down further and anchor in Gravesend Bay below Fort Lafayette. The steamer then proceeded very cautiously through the Narrows, still sounding her whistle as required by law, and at the lowest speed possible to maintain steerage way, until she had the bell of Port Lafayette abaft her port beam. She then stopped her engines and shortly afterwards starboarded her helm to turn out of the Channel, but before any considerable change of heading the man on the lookout descried a vessel which afterwards proved to be the British steamship *Ailsa* lying at anchor in the middle of the channel, and bearing a little on the port hand of *La Bourgogne*, and which had given no warning of her presence by bell or other signal or sound; whereupon the engines of *La Bourgogne* were immediately reversed full speed astern and her helm thrown to port, but notwithstanding these manœuvres the two vessels came together, the stem of *La Bourgogne* striking the *Ailsa* in the port bow and penetrating her hull."

The important issue tendered by this part of the answer is that the "*dense fog which shut out all view of Staten Island and vision ahead through the Narrows*" was not "*encountered*" until after the *Bourgogne* had passed Quarantine (p. 9, fol. 34).

We note:

1. Whether this is an issue at all depends on the meaning to be given to the word "encounter." If this means actually to meet and touch, then the allegation is in the main supported by the evidence. If it read: "The steamer thus proceeded until she was nearly abreast of Quarantine," it would accurately state the facts, for the dense bank of fog did not extend above Quarantine. But if it means to see from the distance of two miles, the allegation is not sustained by any evidence.

There is no pretense that this fog shut in suddenly, or that it could not be seen from abreast of Robbins Reef Light or the red buoy at the tail of the mud flats. This is the bell buoy at the turn of the channel, on the east side, and a little below Robbins Reef Light.

2. The evidence is positive and undisputed that as the *Bourgogne* passed the buoy at the tail of the mud flats, which is over two miles above Quarantine, her captain and pilot, who were on the upper bridge, saw that Staten Island was obscured by a fog which concealed from them entirely the vessels which were lying at anchor off the Staten Island shore (pp. 370, 371, fols. 1480, 1481). They also perceived that the Narrows was full of fog, so that Fort Lafayette was invisible (p. 335, fol. 1340; p. 336, fols. 1341, 1342; p. 410, fol. 1939).

The pilot was asked (p. 371, fol. 1481):

"Did you, at any time after you passed that red buoy at the mud flats on your port side, see Fort Lafayette? A. No, sir.

Q. It was shut in at that time, wasn't it? A. Never seen it at all.

Q. And, of course, you didn't see anything beyond it? A. No, sir.

Again he was asked (pp. 379, 380, fols. 1516, 1517):

"Q. Just as you turned the buoy on the Mud Flats then you saw it was thick down below? A. Yes, sir.

Q. And you decided to anchor? A. In my own mind; I didn't tell anybody.

Q. In your own mind without saying anything to anybody? A. Yes, sir.

Q. You came to the conclusion that you couldn't go to sea? A. Not the way the weather was down below."

Shortly after, and as they approached Quarantine, they lost sight of Fort Hamilton, and the captain then said to the pilot that they ought to anchor (p. 305, fol. 1219); drew a line on the chart submitted herewith (Ex. A) where they entered the dense fog, and he wrote thereon, "ligne á partir de laquelle nous étions dans une brume trés epaisse" (line on leaving which we were in a very thick fog). This was east northeast from the Quarantine landing. The point in mid channel on this line is 3,750 feet from Fort Lafayette. Here is about where the ship was when he advised anchoring.

This was in reference to a then existing contingency. The Staten Island shore and Fort Lafayette were invisible. There was a thick fog in the outer bay; thick enough at that time—as all the witnesses on the *Bourgogne* agree—to conceal Fort Lafayette from them where they were. Indeed, they never were able to see that fort at any time, nor anything below it (p. 314, fol. 1256; p. 334, fol. 1334; p. 335, fol. 1340; p. 363, fol. 1450; p. 371, fol. 1481). It had been more or less thick all the morning. Saturday is a day on which many steamers leave New York. Gravesend Bay is a favorite anchorage in a fog, and the captain and pilot were bound to infer that there were vessels already there. The pilot of the *Ad-*

vance enumerated six steamers anchored off Gravesend Bay, besides his own and the *Ailsa* (pp. 416, 417). Three of them must have gone down before the *Ailsa*.

The *Bourgogne's* pilot ought to have said to himself, "The Narrows are obstructed by a fog. So far as I can see the outer bay is obstructed by fog, the wind is from that direction (S. S. E., p. 304, fol. 1214; p. 306, fol. 1224), and must have brought the fog in, and therefore if there is fog here there must be fog there." He could not have supposed that a curtain of fog hung over Fort Lafayette like the drop in a theatre. Captain Heath, of the *Galileo*, was wiser, and anchored off Stapleton (p. 101, fol. 401); so did other steamers (p. 361, fol. 1444).

The thickness of the fog between half-past one and two is thus stated by an impartial witness, Capt. Cooley of the tug *Harold* (p. 83, fol. 331):

"So thick you couldn't see over 100 feet, if you could see that."

Jaycox, engineer of the same tug, says (p. 95, fol. 378):

"It was so thick you couldn't see where you were going."

POINTS.

First.

On motions for a writ of *certiorari* this Court does not pass finally on the merits of the questions which were disposed of by the Court below. It rather considers whether they are questions of such importance as to require to be fully debated in this

Court, and whether there is sufficient doubt respecting the correctness of the disposition made of them in the Court below, to warrant further and more deliberate consideration.

On the first proposition we submit:

1. The question of navigation involved in the case is not distinctly disposed of by the statutory rules of navigation.

2. It is a question which arises in each of the great harbors on the Atlantic coast several times during the year.

3. It is a question, the determination of which involves the safety of many human lives and the security of large amounts of property. It is true that in the case at bar the steamship sunk was not one of the largest steamships, but she might readily have been. Many large steamships, the *Campania*, of the Cunard Line, the *Werra*, of the North German Lloyd, and other somewhat smaller vessels were lying near the *Ailsa*, and might have been struck by the *Bourgogne* had the *Ailsa* not first received the blow.

Again, it is true that no lives were lost. But the facts disclosed in the record show that this was probably owing to a circumstance which could not reasonably have been expected, that the tug *Harold* was cruising about the harbor in the fog, picking her way by the bells of the bell buoys, and by the bells from ships at anchor (pp. 84, 85, fol 333-337), and that she came upon the *Ailsa* just about the time she was struck, and thus saved the lives of all on board. Possibly, they might have been saved in the *Ailsa's* boats. But the recent sad experience of the very steamer that ran the *Ailsa* down, shows that in emergency and alarm, a steamer's boats are not always sufficient for the safety of the passen-

gers. The path of wisdom is to guard as far as possible against danger of collision.

4. The decision of the Court below in this case does not carry out to their logical consequences the decisions previously made by this Court in reference to collisions in fogs. It is possible that no exact precedent can be found for the precise circumstances of this particular case. But well settled rules respecting the management of steamers with reference to thick fog logically impose the requirement, that ocean steamers manœuvering in crowded harbors and seeing dense fog banks immediately before them, impenetrable to vision, and uncertain of penetration by sound, should anchor before entering into the darkness where safety at most is a matter of good fortune, and not of good management.

5. One other question, perhaps even more important, is involved in the case. The Circuit Court of Appeals and the District Court in effect held that in cases not governed by the rules of navigation, a lesser degree of diligence is to be required of navigators than in cases covered by the rules, and they do hold distinctly that the fact that "the pilots of at least four other steamers came to the same decision and acted accordingly" is controlling upon the question of negligence on the part of the navigators of the *Bourgogne*. We shall endeavor to show that the rule of diligence is entirely irrespective of the question whether or not the particular course of conduct is pointed out by the rules, and that the measure of diligence varies according to the risk, and is not controlled by the consideration whether or not there is a specific statutory requirement. We shall also endeavor to show that on the question of what constitutes reasonable care under the circumstances, the practice of other mariners is not at all controlling. In a word the question is

not what others have done, but what under the circumstances they ought to have done. The consideration of all these questions is greatly simplified by the circumstance, unusual in collision cases, that upon the points which are to be discussed in this brief, there is no conflict of testimony.

The points which have thus been stated and which are necessarily involved in the case, would seem to be quite as important as those which were involved in the *Umbria*, 166 U. S., 404, in which this Court granted a *certiorari* to the Circuit Court of Appeals for the Second Circuit.

In the consideration of these questions attention will only incidentally be called to the position of the *Ailsa*. For if we assume for the sake of the argument that the *Ailsa* was anchored outside the invisible line of anchorage fixed by the Secretary of the Treasury, and that her being anchored there was contributory negligence which should charge her with fault, we shall endeavor to show that even on this assumption the damages should be equally divided, and that the ruling of the Court below in this respect, at least, was erroneous.

If the writ of *certiorari* should be granted, the whole merits of the case would then be open for discussion, but for the purposes of the present motion it would seem sufficient to show that the *Bourgogne* at least was equally in fault.

Second.

Bourgogne at fault for not anchoring above the Narrows.

The rule as to vessels at anchor is thus stated by Judge LOWELL in the *Lady Franklin* (2 Lowell's Rep., 220).

"That a vessel which is in motion is bound to avoid one lying at anchor, is a rule so plainly founded in reason that there can never be a difference of opinion about it."

S. P. The Rockaway, 19 Fed. Rep., 449; affirmed by Judge WALLACE, 25 Fed. Rep., 775.

The *Louisiana*, 3 Wall, 164.

The *Granite State*, 3 Wall., 111.

The rule is the same in the English Courts.

The *Blue Bell*, Probate Division (1895), p. 242.

This was the case of a steamer going down the Thames and running into a dense fog; she stopped her engines and went down with the tide at the rate of two knots.

Mr. Justice BRUCE said (Mr. Justice JEUNE concurring):

"In a dense fog it is the duty of a steam vessel to anchor as soon as circumstances will permit. The neglect of the duty to anchor in a thick fog is a frequent cause of damage to property and loss of life, and we conceive it to be highly important in the interests of navigation that those who disregard the duty should bear the loss occasioned by their imprudence."

S. P. The Otter, Law Rep. 4 Adm. and Ecc., 203.

The burden of proof is on the vessel in motion, to show that the collision occurred without fault on her part.

The Meanatchy, L. R., 1897, Appeal Ca., 351.

The Annot Lyle, 11 Prob. Div., 114.

The Indus, 12 Prob. Div., 46.

The Bothnia, Lush., 52.

The Baltic, 2 Bened., 452.

In the *Batavier*, 2 William Robinson, 407., affd. 9 Moo. P. C., 286, Dr. LUSHINGTON said:

"That the vessel under way is bound to show, by clear and indisputable evidence, that the accident did not arise from any fault or negligence on her part, and for this obvious reason, that a vessel lying at anchor has no means of shifting her position or escaping the collision. It is, I apprehend, the bounden duty of the vessel under way, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever."

This proposition is admitted by the Circuit Court of Appeals. At pp. 504-505 of the Record the Court says:

"Inasmuch as the moving steamship had collided with a vessel at anchor, and therefore powerless to help herself, it was incumbent upon the ship in motion to take the burden of freeing herself from this charge of negligence, for the presumptions were *prima facie* against her; and, if the vessel was anchored in an improper place, the colliding vessel should show that she could not be avoided by the use of due care."

This latter admission leads logically to a conclusion the soundness of which the Court deny, to wit, that it was the duty of the *Bourgogne* to anchor above the Narrows. In the failure to recognize the necessary connection between the two propositions lies the inherent fallacy of their opinion:

1. If it was the duty of the *Bourgogne* to take precautions to avoid the *Ailsa*, even if the latter was in a wrong place, it was her duty to take these precautions in season.

"Precautions not seasonable are of little or no value, nor do such efforts constitute a compliance with the usages of the sea or statutory rules of navigation. Such precautions must be seasonable

in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defense to say that nothing more could be done to avoid the collision, nor that the necessity for precautionary measures was not perceived until it was too late to render them availing."

The *Sunnyside*, 91 U. S., 208.

It is obvious that in a fog so dense that you cannot see over 150 feet, and in a tideway where the tide runs from two to three knots, no precautions either of signal or lookout can be of any value so far as a vessel at anchor is concerned. Signals would be useless, for the vessel at anchor could not avoid the oncoming vessel. The lookout could not see far enough to enable the moving vessel to stop in time to avoid a collision.

The rule on this subject is well established:

In the *Nacoochee*, 137 U. S., 330, 339, the Court cite with approval the *Batavier*, 9 Moore, P. C., 286, as follows:

"The rule laid down in the last-named case is that, at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate."

In the *Umbria*, 166 U. S., 404, 417, this Court say:

"It was said in the early case of The *Batavier*, 9 Moore, P. C., 286, that 'at whatever rate she was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate.' This language was quoted with approval in the *Colorado* vs. The *H. P. Bridge*, 91 U. S., 692, 703.

"So, too, in the case of The Great Eastern, Brown & L Adm., 287, it was said that 'their lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will en-

able her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place."

S. P.—The *Grenadier* vs. the *August Korff*, 74 Fed. Rep., 974.

The *Pennsylvania*, 4 Bened., 257; affirmed on this point, 19 Wall., 125.

At p. 134, this Court say:

"Even if it were true that such a rate was necessary for safe steerage, it would not justify driving a steamer through so dense a fog, along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been their duty to lay to."

Marsden on Collisions (3 Ed), 402, thus states the rule:

"In a fog so dense that it is not possible for a ship to see others in time to avoid them, she is not justified in being under way at all except from necessity."

Ibid., p, 404.

"Nor is she justified in the Thames in leaving a wharf in a dense fog for the purpose of going up the river on a flood tide."

I bid, 515.

"If the weather is such that an object cannot be seen in time to avoid it, a vessel has no right to be under way at all. In such weather she should bring up on the first opportunity, and not get under way unless obliged to do so."

S. P. The *Raleigh*. 41 Fed. Rep., 527.
The *H. F. Dimock*, 77 Fed. Rep., 226,
23 C. C. A., 123.

The *John Adams*, 1 Cliff., 404. At page 414, the Court say:

"When those in charge of them have lost the

bearings of the vessel and do not know that the way is clear, they should stop, and if necessary come to anchor; and if contrary to these suggestions, they rashly advance, the owners must take the consequences."

2. But it is said there is no statutory rule requiring a steamer always to stop before she runs into a dense fog. True. Nor could such a general rule be wisely established. But it by no means follows that under the circumstances of this case the duty of stopping before reaching the fog did not devolve upon the *Bourgogne*. The Circuit Court of Appeals on this point say (86 Fed. Rep., 480):

"Her act was not in violation of a statutory rule. Therefore, its negligence or its accord with prudence must be judged of by the aid of the considerations which naturally designate conduct in this respect."

The Court then proceeds to hold that inasmuch as four other steamers that day ran through the Narrows and anchored in Gravesend Bay, this was a prudent thing to do.

In this conclusion lies the second fallacy of the opinion.

The frequency of a transgression may diminish moral blame, but not legal liability. This is the ancient defense for steamers running too fast in a fog. All the great liners do this, and generally escape accident. But all the authorities agree that they do it at their own peril, and if collision does happen the vessel in fault is charged, notwithstanding the fact that she is only one of many offenders.

The *Martello*, 153 U. S., 64, 71.

The ordinary care required by law is not the care that the ordinary man has taken, but the care the Judges think he ought to take under the circumstances of the case.

In Thorp *vs.* Hammond, 12 Wall., 408, two schooners were near the *Huntley* and were likely to beat out their tacks and come about. This Court held that these circumstances imposed on *Huntley* the duty of special vigilance. Evidence was given that it was customary not to have a lookout in the day time, and while reefing. The Court held that such custom "would not be a reasonable one, nor sufficient to justify the absence of a lookout." The same rule has been applied in a variety of cases.

Wabash R. R. *vs.* McDaniels, 107 U. S., 454.

The claim was that the diligence used in the employment and retention of the telegraph operator employed by the company was that which was customary among railway managers. This Court say (p. 461):

"To this view we cannot assent. * * * A degree of care ordinarily exercised in such matters may not be due or reasonable or proper care, and therefore not ordinary care within the meaning of the law."

To the same effect are

Grand Trunk R. R. *vs.* Richardson, 91 U. S., 454, 469.
Maynard *vs.* Buck, 100 Mass., 40.
Chicago &c. R. R. Co. *vs.* Clark, 108 Ill., 113.

It appears from the report of the *Sunnyside* in the Circuit Court, 1 Brown, Adm., 227, 238, that the tug was lying for a tow "in conformity with a well-known usage." Yet this Court reversed the Circuit Court on this point (affirming, however the District Court) and held the tug in fault.

The *Sunnyside*, 91 U.S., 208, 212.

3. In this connection the attention of the Court is called to Rule 20 of the Sailing Rules of 1864, which is the same as Article 24 of the Sailing Rules of 1885 (23 Rev. Stat., 442), and Article 29 of the Rules of 1890. This rule is as follows:

"ART. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or *by the special circumstances of the case.*

This Court held that although this original rule of 1864 was not re-enacted by the Revised Statutes it remained in force, even before it was re-enacted in 1885.

The *Elizabeth Jones*, 112 U. S., 514.

The probable reason why it was not re-enacted by the Revised Statutes was that it was thought to be unnecessary, but for greater caution it now finds a place in the official code. It recognizes the great cardinal principle in all cases of negligence, that the degree of care should be proportioned to the risk. This rule finds illustration in many reported cases.

The *Ariadne*, 13 Wall., 475.

At page 478 this Court say:

"The waters near the city of New York are at all times crowded with shipping. Navigation there is not unlike the traveler threading his way through the mazes of a forest, with the difference that most of the objects to be avoided are also in motion. The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The

same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirement rises according to the power and speed of the vessel in question. It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety for other vessels. But it is equally important to vessels of that powerful class for their protection from one another. It is the duty of all Courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application."

Especial attention is called to this case because the Court did what it is asked to do in the case at bar, gave to the rule referred to, "the fullest effect," and reversed the decisions of the Courts below which had not done so. This decision in the *Ariadne* was cited with approval in

The Oregon, 158 U. S., 186, 193.

In the *Mellona*, 3 W. Robinson, 7, 13, Doctor Lushington thus states the rule:

"It is no excuse to urge that from the intensity of the darkness, no vigilance, however great could have enabled the *Mellona* to have descried the *George* in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed."

4. It was argued strenuously below that no cases had ever held that there was any duty upon a vessel not to enter a fog. We do not contend that on an ocean voyage a steamer is ordinarily bound to stop when a fog bank is seen ahead. It has been held that under such circumstances she is bound to reduce her speed before she enters the fog, so that when she gets into it she shall not be going at a rate of speed which the Court would hold to

be excessive. To use the language of Judge BROWN in the

City of Alexandria, 31 Fed. Rep., 427, 431.

"The steamer running into a fog bank was bound at her own risk to moderate speed as soon as she got into a fog and to regulate her approach to a fog bank accordingly."

S. P. The *Trave*, 55 Fed. Rep., 117.

We submit that the principle of these cases is applicable to the case at bar. We have here a vessel leaving her pier under circumstances which soon disclose to her that it is impossible for her to go to sea. A fog bank is seen ahead of her so dense as to entirely conceal the shore and fort. Under these circumstances the same reason that requires speed to be slackened before entering a fog bank at sea, requires the vessel, knowing that she cannot go through the fog bank, to avoid entering it, and come to an anchorage in a place known to be one of safety.

5. It is argued that the pilot could not tell but that when he should reach "Fort Lafayette, he would still be able to see two miles ahead." This does not state the testimony correctly. As already shown, and as alleged in the answer already quoted there was no fog in the upper harbor. It is not the case of a vessel in a light fog, allowing objects to be descried at a distance of two miles, but of a vessel in a rain, seeing a dense fog bank two miles off, and knowing that at the moment she can anchor in safety, but also that in the fog she cannot move without danger.

Moreover the proof from the pilot of the *Advance* who followed the *Bourgogne* closely, is that the rain was drenching (p. 422, fol. 1687) and the

weather even in the upper bay so thick that a steamer could not be seen at a distance of a quarter of a mile (p. 424, fol. 1694, 1695).

Third.

Position of the Ailsa no Excuse to the Bourgogne.

It was argued strenuously in the Court below that if the *Ailsa* anchored outside the anchorage line, this fault on her part would deprive her of all remedy.

I.—Assuming, for argument sake, that this was a fault, as the Courts below held, the damages should still be divided.

In the *Maria Martin*, 12 Wall., 31, this Court say (p. 47):

"Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every precaution required by the special circumstances of the case to prevent a collision."

The authorities cited for the claimant all recognize this proposition.

In Strout *vs.* Foster, 1 Howard, 89, the report, as well as that in 17 Peters, 107, shows that this Court was equally divided. Mr. Justice McKinley's opinion in the Circuit Court, which is quoted in Howard's report, reversed the judgment of the District Court. The case can hardly, therefore, be considered as authority. But one of the propositions in Justice McKinley's opinion is quoted in later cases, especially

The *Clarita* and the *Clara*, 23 Wall., 1, 14.

This Court there add:

"But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her, if it be reasonably practicable and consistent with her own safety."

The other cases cited by the respondent do not contest this proposition, and Justice McKinley himself admitted in the opinion referred to that if both were at fault the damages must be divided.

In the *Bedford*, 5 Blatchf., 200, Mr. Justice Nelson held both vessels at fault, the schooner for anchoring in or near the track of ferryboats in violation of city ordinance, and the ferryboat for not using greater precautions to avoid the schooner.

In the *Scioto*, 2 Ware, 360, 368, Judge WARE says:

"Admitting that she was anchored in an improper place, her fault would not excuse any want of care and caution in another vessel."

In the *Marcia Tribou*, 2 Sprague, 17, Judge Sprague held both vessels at fault, the sloop for anchoring outside the Harbor Master's lines and the schooner for having no lookout.

The question could not arise in Lambert *vs.* Staten Island R. R., 70 N. Y., 108. That was an action at common law, and proof that plaintiff was negligent defeated the action.

The English law is the same as ours on this point.

In *Hay vs. LeNeve*, 2 Shaw, Sc. App., 395, the House of Lords held both vessels at fault, one for being anchored in the fairway in the Firth of Forth, and not showing a light, and the other for not having proper lookout.

II.—Under the circumstances of this case the

Ailsa was not at fault for anchoring outside the anchorage line.

The *D. S. Gregory*, 6 Blatchf., 528.

In this case a steamer anchored in the North river in the track of ferryboats. The fog was so thick "it was difficult to see a vessel at a distance "of a ship's length ahead."

Mr. Justice NELSON held that she was not in fault for anchoring there under the circumstances.

S. P. The *Aguadillana*, 6 Asp. M. C. (N. S.), 390.

The *H. F. Dimock*, 77 Fed. Rep. 226; 23 C. C. A., 123. In this case the District Judge held that the *Alva* was not to blame for anchoring in dense fog in the Slue, a much frequented channel. The opinion is not reported. The Circuit Court of Appeals expressed "general concurrence in the views of the learned Judge of the District Court" (p. 231, Fed. Rep.; p. 128 (C. C. A.)

The effect of the Treasury Regulations will be fully discussed under the Fourth Point.

The thickness of the fog when the *Ailsa* anchored is well described by the passenger Pearce, who says that the two ships that passed shortly after, at a distance of only fifty yards, showed like dim spectres through the mist (pp. 191, 192, fols. 764, 765). He was examined six days after the collision (p. 189, fol. 754).

1. The reason given by the pilot for anchoring where he did is satisfactory. The pilot says that he heard so many bells ahead of the *Ailsa* that he was afraid to go further, and so anchored where he did (pp. 58, 59, fols. 232, 233; p. 66, fol. 262; pp. 67, 68; fols. 268, 269; p. 72, fol. 288; p. 80, fol. 318; p. 81, fol. 322). This is corroborated by Captain Morris p. 111, fol. 444; p. 112, fol. 445); by Cote

(p. 145, fol. 519); by the very intelligent passenger, Pearce (p. 201, fol 801); by Smith (p. 209, fol. 833; by Captain Cooley of the *Harold*, who heard bells from three steamers before he heard the *Ailsa's* (pp. 84, 85). The engineer of the *Harold*, Jaycox, testifies to the same effect (p. 95, fol. 378). Counsel for the *Bourgogne* argue that these bells, which did confessedly ring while the *Ailsa* was at anchor, were the bells of vessels that anchored after she had done so. But the only evidence of any vessel that passed after she anchored are of the German steamer, another steamer unknown, and the *Advance*. The *Advance* was, however, certainly not one of the steamers that the *Harold* heard, because she did not approach the *Ailsa* until after the collision and was then under way, while the bells were heard by the Captain of the *Harold* before he saw the *Ailsa* or heard her bell. Captain Poirot lays down on his diagram only two vessels, but he testifies expressly that after he anchored "there were "ships all over to the east and south of my vessel "and the *Werra* * * * six or seven perhaps" (p. 309, fol. 1235).

2. The District Judge goes into an argument to show that no bells or whistles could have been heard when she stopped, because "there were no other steamers within a half mile of her."

One fallacy of his argument is in the assumption that no vessels were moving about in the lower bay, and that we have traced every vessel that did go down that morning. We have shown that the tug *Harold* was "cruising for a job" (p. 85, fol. 337), and there were probably others (p. 293, fol. 1169). What right had the Court to say that there were none, in the face of positive and uncontradicted testimony from unimpeached witnesses, that they heard whistles and bells ahead of the *Ailsa*, before she anchored?

Another fallacy lies in the assumption that the pilot and captain of the *Ailsa* could tell certainly that the steamers referred to were half a mile off. Captain Poirot saw their distance, but this was after the fog lifted. Is this Court prepared to hold that a steamer, running with a swift tide, has the right to speculate whether a bell heard ahead in a dense fog is more or less than 1,500 feet distant? If the *Ailsa* had gone ahead and struck one of these vessels, would she not have been held at fault? How then can it be said that she was to blame for anchoring?

Had she gone farther she would have been in equal danger from the Bourgogne.

3. Another fallacy lies in the assumption that it is possible in a dense fog to tell just where the anchorage line is. The pilot under such circumstances is between Scylla and Charybdis. If he goes too far he runs ashore. If there are vessels ahead he is in danger of running into them. Yet the argument compels him to locate exactly an imaginary line although he can see nothing; to guess accurately as to his bearings, and anchor in just the right place, under peril of forfeiting his right to recover at all, if another ship runs into him.

When the tide is running out he is in this additional dilemma. If he drifts with the tide he has no steerageway. If he makes two knots an hour headway through the water, he makes five knots over the ground, and all agree this is too fast in such a fog. The only rational rule is to require all steamers under such circumstances to anchor where they are. Then all will be secure. On any other rule all are in peril.

4. The argument for respondent is that the anchorage line could be known by the direction of the sound from the fog bell on Fort Lafayette.

The well-known uncertainty of direction of sounds heard in a fog would make this a perilous guide.

5. Even in case of a violation of the sailing rules prescribed by statute, the vessel committing the breach, is not held to be at fault, if it distinctly appears that this did not contribute to the injury. In such cases the violation is of an affirmative requirement, intended to secure active diligence on the part of navigators.

In the case at bar the Treasury regulations have a different function. Their purpose is to provide a convenient anchorage ground, under ordinary circumstances, for vessels intending to remain for some time. The only way in which a violation of them can be said to contribute to a collision is, that the vessel at anchor might not have been run into, if she had not been anchored in the particular place. Such a fault does not constitute contributory negligence, within the meaning of the law.

It is well recognized on land as well at sea, that the violation of a statute does not of necessity bar a plaintiff's right of action.

Of this proposition there are many illustrations in reported cases.

A case exactly in point is where a man is driving on the left-hand side of the road in violation of an ordinance, but that fact is held to be no defense to another who negligently runs into him.

Spofford *vs.* Harlow, 3 Allen, 176.

So also the fact that a person, in violation of a statute, is standing upon the platform of a street railway car, is no defense to an action for injury caused by the driver of a wagon who negligently runs against the car.

Connolly *vs.* Knickerbocker Ice Co., 114 N. Y., 104.

Even a trespasser upon a railway train cannot be lawfully ejected when the train is going at a dangerous speed.

Carter *vs.* Louisville &c. Ry., 98 Ind., 552.

When two men are racing in violation of a statute one of them is liable who wilfully runs into the other, and the violation of the statute is no defense.

Welch *vs.* Wasson, 6 Gray, 505.

"Though one may have wrongfully put himself upon the premises or in the power of another, he has not thereby made himself as to the other an outlaw; and if the other injures him by some disconnected wrongful act, or by the disconnected omission of a duty which even in these circumstances lies upon him, the former may maintain his suit therefor."

Bishop Non-Contract Law, Section 61.

The man who has the last clear chance to avoid the injury and does not, is the man who is its responsible cause.

It is well settled in this Court and in the Court of Appeals of the State of New York, as well as in many other States, that a violation by the injured party of the law against traveling or working on Sunday, is no defence to an action for negligence.

Philadelphia W. & B. R. R. *vs.* Phila. & Havre de Grace Co., 23 How. U. S., 209.

Platz *vs.* City of Cohoes, 89 N. Y., 219.

In the latter case the authorities are collected and analyzed by Judge Danforth.

S. P. Sewell *vs.* Webster, 59 N. H., 586.

Opsall *vs.* Judd. 30 Minn., 126.
Knowlton *vs.* Milwaukee City R. Co., 59 Wis., 278.
Louisville &c. R. Co. *vs.* Frawley, 110 Ind., 18.

In Massachusetts, in which a contrary rule is laid down on this particular point, it is held that the owner of a horse and wagon, who in violation of the Sunday law, lets them for hire on that day, may recover damages for injury caused them by the negligence of the hirer.

Hall *vs.* Corcoran, 107 Mass., 251.
S. P. Frost *vs.* Plumb, 40 Conn., 111.

Whether the *Ailsa* was violating the Treasury regulation, or not, the *Bourgogne* is not excused from exercising due care toward her, and the *Ailsa's* recovery in this case, would not involve an affirmance of her right to anchor in the channel so far as the United States was concerned, but would involve an affirmance of her right not to be negligently run down by the *Bourgogne*. There is a duty of care even towards a violator of the law.

Fourth.

Bourgogne's Other Excuses.

I.—The argument is that it was too late to anchor when off Quarantine. But when the *Bourgogne* passed the red buoy at the tail of the mud flats, her officers saw the Narrows obstructed, they had every reason to believe vessels were at anchor below the Narrows that went down earlier in the day, they knew that there was a dense fog

there and had every reason to believe it was as dense all the way down. The pilot says: "Just after we turned the red buoy I seen it was thick down below," and decided to anchor (p. 379, fol. 1516). If he had acted promptly on this decision all would have been well. He procrastinated and the *Ailsa* was lost.

1. The *Bourgogne* had just passed a steamer (p. 320, fol. 1279; p. 361, fol. 1444), and was thus warned that other vessels were or might be moving in the fog. She knew or ought to have known that other steamers had gone down not long before. When off the red buoy she had ample opportunity to anchor either off Bay Ridge, where the chart shows the anchorage is excellent, or off St. George or Stapleton. Chargeable with knowledge of all these facts, she deliberately went on. It follows that the *Bourgogne* went on at her own risk, and is chargeable with the consequences of whatever happened. She ran the risk of encountering vessels as she went through the Narrows and in the jaws of the Lower Bay, when manœuvering would be difficult and stopping in time might be impossible. All that, too, in the face of the conceded fact that there had been a freshet in the Hudson; that the current was running with unusual speed, and at nearly or quite three knots (p. 58, fol. 232; p. 323, fol. 1290; p. 324, fol. 1293; p. 327, fol. 1306; p. 370, fol. 1480). That would make it difficult for a vessel of the size of the *Bourgogne* to stop, much more to manœuvre with ease. This the event proved, for after she reversed her engines at seven minutes past two (the time given by her engine room log), it took her fifteen minutes to come to an anchor (p. 350, fol. 1390), although her captain, according to his own account, was using great diligence to bring her to an anchor (pp. 407–409).

2. The intrinsic fallacy in this argument consists in forgetting that the more vessels that went down the greater the danger. The first one had a clear field. When the *Ailsa* went down it was not so thick but that her pilot and captain saw Fort Lafayette (p. 77, fol. 306; p. 106, fol. 421, 422). The fog afterwards thickened, the Fort had become invisible, and this warned the *Bourgogne* not to attempt that narrow channel.

The fog on the day of this collision was as thick as it ever is in New York. Such fogs do not often occur, but there is seldom a winter when there is not one. Ferryboats may make their trips at such times, but large ocean steamers can wait and ought to wait. Confessedly they cannot go to sea. What hardship then is it to require them to remain in a place of safety until the fog lifts? The number and size of such steamers increases every year, and with that increase the peril to life and property also increases. The *Ailsa* became a total loss; fortunately no lives were lost but the next time such a collision occurs the passengers may not be so fortunate. As it was, they were in great danger and suffered extreme exposure and hardship (see evid. Pearce, pp. 202–207). All this would have been prevented if the *Bourgogne* had anchored off Bay Ridge or Stapleton.

3. The speed of the *Bourgogne* is proved by the unfailing test of the entries of time in her engine room log (p. 350, fol. 1390). This gives the order to reverse at full speed as seven minutes past two. Her log gives the time she straightened on her course as 1:37" (p. 453, fol. 1810). Her captain says she "was only turned at 1:37 (p. 304, fol. 1213). This makes exactly one-half hour from straightening on her course until the reversing full speed, which every one agrees was almost immediately before the col-

lision. The distance from a point abreast her pier to the place of collision, measured as the channel turns off the red buoy, is at least eight and a half knots. She made this distance in half an hour, which is a speed of seventeen knots over the ground. The tide was with her and accelerated her speed.

Counsel claims to deduct one mile for the drift while she was straightening on her course. That is entirely conjectural. In backing out she would naturally back the stern up stream in order to get the swing of the tide upon the bow to go down. Otherwise the tide would have swung her stern down stream. But her engines were powerful enough to overcome the ebb tide, and were undoubtedly used for that purpose.

But even if she drifted a mile down stream before 1:37, that would make her average speed up to 2:07, fifteen knots. She slowed after passing the red buoy, and her engines were stopped for a minute or two. Her speed to the red buoy was therefore at least seventeen knots, which was unreasonable and excessive in the weather as it was that day. Doubtless one reason why it was difficult to anchor when she reached the red buoy was the great speed of the *Bourgogne* at that time, and this aggravates her fault. Everything indicated an approaching fog and thick weather in the Narrows. Never at any time did they see Fort Lafayette or anything below (pp. 335, 336, fols. 1340–1343). At all times Staten Island was concealed from her (p. 58, fol. 228 ; p. 304, fol. 1215 ; p. 362, fol. 1446). The fog had thickened. When the *Ailsa* went down her pilot and captain saw Fort Lafayette (p. 58, fol. 231 ; p. 81, fol. 324 ; p. 106, fol. 421, 422) and the royal yards of vessels lying at anchor on the Staten Island side (p. 59, fol. 230), and her captain and chief officer saw the crest of the ridge at Fort Tompkins (p. 106, fol. 423 ; p. 136, fol.

544). When the *Bourgogne* went down all was invisible on that side (p. 317, fols. 1265–1267 ; p. 362, fol. 1446 ; p. 371. fol. 1482). She should, therefore, have gone down slowly and under control. She never ought to have got to Quarantine, moving so rapidly that it was impossible to regulate her movements in time to anchor, when anchoring became prudent. A strict ruling on this point is of great importance to the commerce of this country. There were other collisions in the fog that day (p. 62, fol. 246). It is very important that this Court, which makes the law for our harbors, should declare it so clearly and explicitly that such collisions will not occur in the future. The decision will not simply determine the past, but will be a headlight illuminating the future.

II. —*The Bourgogne* relies on the Treasury Regulations, adopted in pursuance of the United States Statute of May 16, 1888. The act authorizes and directs the Secretary of the Treasury to "define and establish an anchorage ground for vessels in the bay and harbor of New York and in the Hudson and East rivers, and to adopt suitable rules and regulations in relation thereto." In pursuance of that power the Secretary of the Treasury has adopted regulations (Record, pp. 491–500).

The *Bourgogne* claims that under these regulations, anchoring in Quarantine grounds is prohibited except to vessels coming in from sea, and that she could not lawfully anchor off Quarantine. To this there are several answers :

1. That Act and the rules under it were intended to point out places where vessels could ordinarily lie. The only indication in the regulations as to what might be done in case of stress of weather or great emergency is at the end of the 18th regulation : (p. 497).

"No vessel shall anchor in any of the following channels: Gedney's Channel, Main Channel, Swash Channel and East Channel, except in cases of great emergency, and then outside of the channels, as marked by the buoys, and only until they can procure assistance."

These channels are all comparatively narrow, and have shoals on either side. They are not defined by the land as are the wider channels in the Upper Bay and through the Narrows. For all these reasons, anchoring in them under any circumstances would be especially dangerous, and is therefore especially prohibited. But in view of the fact that the rules are made for ordinary cases, and point out where vessels may lie for weeks if they choose, taking on or waiting for a cargo; they cannot be construed as prohibiting a vessel from obeying the well-settled rule that it is her duty to anchor at once, when unexpectedly beset with fog, even though in the channel. The Secretary cannot be presumed to have intended to abrogate this established rule of navigation without the clearest evidence; and none such appears, either in the act itself or in the regulations adopted under it.

2. The regulation relating to the Quarantine anchorage is as follows (p. 496):

"NOTE.—No other vessels than those which are detained at Upper Quarantine shall anchor on this anchorage between Fort Tompkins Light and Quarantine Wharf at Castleton, Staten Island."

This wharf is that at the Health Officer's Station.

This regulation did not forbid the *Bourgogne* to anchor at Quarantine. The prohibition extends only to "other vessels than those which are detained at Upper Quarantine." But the *Bourgogne* was detained there by the fog. The rule specifies no

cause for detention, but treats any detention as sufficient cause for anchoring there. Certainly the fog was such a cause.

The anchorage there is 3,000 feet wide (Reg., 17, p. 496), and vessels as large as the *Bourgogne* anchor and swing there with safety (p. 381, fols. 1521, 1522).

No signals were heard from there (p. 377, fols. 1505, 1508). In such a fog no vessels could come in from sea, and therefore the place was safe and anchorage there admissible.

Fifth.

Look-out.

The *Bourgogne* ought to have had a look-out in the cro'-nest. This was 40 feet, 8 inches, above the deck (p. 439, fol. 1755), and no look-out was stationed there (p. 352, fol. 1408). The forecastle deck was only 27 feet above the water (p. 425, fol. 1698). The fog was thickest on the water. Mast-heads could be seen when vessels could not (pp. 313, 314; fols. 1252, 1253). The *Ailsa's* masts were seen as quickly from the *Bourgogne's* bridge as from her forecastle, though that was much nearer; and were seen before her hull (p. 255, fol. 1019; p. 265, fol. 1060; p. 272, fol. 1087; p. 273, fol. 1092; p. 275, fol. 1099).

Giquel, the second captain of the *Bourgogne*, who was on the forecastle (p. 338, fols. 1350, 1352), testified as follows (p. 340, fol. 1358):

"As we were completely in the fog, I looked out very attentively. Suddenly I perceived ahead of me the masts of a ship. I had two blasts of the horn then given, which indicates a vessel ahead, almost right ahead; she was little on the

port hand, but almost right ahead of us. I had the notice sent to the captain by a man who was on service to tell him there was a ship almost right ahead, and I had hardly given this signal before I saw the funnel of the ship. I then sent the order by the same man to inform the captain it is a steamship. And immediately—because these things happen almost simultaneously—I sent an order to the master to say it is a steamship at anchor; all those three events happen almost simultaneously."

Even Murphy, the third officer of the *Ailsa*, who was examined for the *Bourgogne*, admitted that at times, while the *Ailsa* was lying at anchor, he could see the flagstaff of Fort Tompkins, and the grassy slope of the ramparts, both of which are on the crest of the ridge (p. 385, fol. 1539).

It is altogether probable that a look-out aloft might have descried her masts in time to avoid the collision.

Limpaler, who was on the *Bourgogne's* forecastle, says: "If we had seen her three seconds sooner we would not have touched her" (p. 268, fol. 1069).

Sixth.

Backing away from Sinking Ship.

The fact that the *Bourgogne* backed away from the *Ailsa*, and rendered no assistance, raises a strong presumption of fault which there is nothing in her evidence to overcome. There was no hail from the *Bourgogne* to the *Ailsa* (p. 194, fol. 775; p. 212, fol. 845; p. 223, fol. 892). This testimony of the *Ailsa's* witnesses is not denied by any one from the *Bourgogne*. However excellent the captain's intentions were (as shown by his getting ready to lower his boats), nothing in fact

was done for the *Ailsa*, and the movements which the pilot determined upon were such as would inevitably carry the *Bourgogne* to such a distance that no relief could be afforded. The obvious thing to do would be to stop the engines immediately after the collision. Reversing had swung her bow to starboard, and if she had gone straight on in that direction she would have passed the *Ailsa* near enough to communicate and render assistance, but not near enough to do injury. But backing for four minutes or for three, threw her head so much to starboard that when she came to make the swing that she did, it would certainly bring her a great way off from the *Ailsa* and a long way below her, as in fact it did.

The statute provides that under such circumstances the presumption of fault is against the steamer that does not stay by the sinking ship and render her assistance. "If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default" (26 Stat. at Large, p. 425, § 1). This statute by Proclamation of the President took effect December 11, 1890 (*Ibid.*, p. 1561). That statute formulates a reasonable rule of law, which the Courts recognized before the statute.

The *Atlas*, 4 Bened., 27.
The *America*, L. R., 4 Adm. & Ecc., 226.
The *Adriatic*, 33 Law Times, N. S., 104.

The English statute is to the same effect.
36 and 37 Vict., c. 85, § 16.

If the pilot had been conscious that he had been entirely justified in getting into that fog, his first

impulse would have been to go alongside of the *Ailsa* and help her, if he could. But if he was conscious that he had failed to comply with Captain Poirot's reasonable request, that he had taken a risk he ought not to have taken, and that the consequence was injury to another vessel, his impulse would be to get away as quickly as he could, hoping that he might get out of sight and it never would be known that he had caused the injury. It happened that the *Bourgogne* was somewhat injured and had to come back to port, but this he could not foresee.

Seventh.

Too Frequent Whistling.

Article 12 of the Rules of Navigation of 1885 and Article 15 of the Rules of 1890 alike require that "a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast."

In Article 15 of 1890 "prolonged blast" is defined to mean "a blast of from four to six seconds' duration."

This is a just definition of the words used, and not the arbitrary enactment of a statute.

The object of the requirement is to enable other vessels, charged with some duty with reference to the approaching steamer, to hear her approach. But it must be construed reasonably. In the case of a steamer approaching a sailing vessel or a vessel at anchor, it is much more important that she should hear them than that they should hear her. Article 23 of the Rules of 1885 and Article 27 of the Rules of 1890 alike provide:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

This the *Bourgogne* should have considered when the orders were given as to the whistle.

It is plain on the evidence that the *Bourgogne* whistled so constantly that her officers and lookout could not hear the signals of other vessels.

I.—The report to the Consul General and the statement in the log agree that the *Bourgogne's* whistle was blown at very short intervals, "as you might say almost continuallly" (p. 450, fol. 1797). Rempler, who was on the bridge, admits the correctness of this phrase (p. 405, fols. 1617, 1618), and so does Giquel, who was on the forecastle head (p. 343, fol. 1370). Capt. Poirot says: "Probably every twenty seconds, perhaps oftener" (p. 313, fol. 1252). It was a "very heavy" whistle (p. 321, fol. 1281). When the *Bourgogne* slowed, there was no propriety in whistling so frequently. The inevitable tendency was to dull the hearing of those who were charged to observe the signals from other vessels, and it is in that way that we may account for their failure to hear the bell of the *Ailsa*.

The tendency of too frequent blowings is to dull the hearing of a person on watch. The impression it made on Lemoyne, who was on the forecastle, was that she "blew the whistle all the time" (p. 262, fol. 1048). Captain Poirot was pressed on that subject on cross examination. Counsel for the *Bourgogne* saw the importance of it and recalled the captain to explain it. He said the International Rules require the whistle to be blown every two minutes, but probably that was intended for slower vessels, and that it wasn't enough now

(p. 405, fol. 1620). We asked him if that didn't depend upon the speed of the vessel, and he admitted it did (p. 406, fol. 1624). A vessel running at the rate of fifteen knots an hour, runs a knot in four minutes, and two whistles within the space of a knot would be small warning of approach. But when a vessel is going slowly as the *Bourgogne* is alleged to have been, the conditions are entirely changed. The only way in which one can tell the motion of an approaching vessel is by the observation of successive whistles. If they are blown so frequently as this, they tend to run into each other. There is a certain reverberation, especially in passing between the bluffs on either side of the Narrows.

II.—The best evidence that either this, or negligence, prevented the *Bourgogne's* outlook from hearing the *Ailsa's* bell, is the admitted fact, that other vessels and tugs passed up and down, or were at anchor; yet the *Bourgogne* heard no signal whatever from any other vessel until she anchored, except a whistle from a following steamer as she entered the fog, and one or two whistles from tugs (p. 263, fol. 1051; p. 265, fol. 1060; p. 275, fol. 1093; p. 283, fol. 1132; p. 321, fols. 1283, 1284). Lecouedic, one of her lookouts, did not hear even the great bell on Fort Lafayette (p. 256, fol. 1023; p. 257, fol. 1028). There were six or seven vessels at anchor, they were seen when the fog lifted, and their bells were heard to ring after the *Bourgogne* came to anchor, yet her witnesses heard none of them before, except Capt. Poirot, and he heard only the *Werra's*. The pilot and Giquel (who was on the forecastle head) did not hear even this before the *Bourgogne* anchored (p. 366, fol. 1462; p. 372, fol. 1487; p. 341, fol. 1363; p. 343, fol. 1371; p. 344, fol. 1376). These bells were heard on the *Ailsa*, and ought to have been on the *Bourgogne*.

III.—Capt. Beers, of the *Advance*, testifies that before he saw the *Ailsa*, he heard her three alarm whistles after the accident (p. 291, fol. 1162). Watson, the pilot of the *Advance*, heard them several times (pp. 412, 413, fols. 1648, 1649). Capt. Cooley and Frank Jaycox heard them on the *Harold* (p 88, fol. 351; p. 99, fol. 393). The *Ailsa*, naturally, would blow them. Nelson swears he did blow them (p. 164, fol. 656). Yet those were not heard on the *Bourgogne* (p. 329, fol. 313). One reason that Capt. Poirot gives for this is: "My whistle was going, too" (p. 329, fol. 313).

The captain's only explanation of this is that they were to leeward of him. But in fact they were to windward. The wind was S. S. E., and he passed to the westward of them. Giquel cannot explain his not hearing them (p. 344, fol. 1375).

IV.—This fact that signals were heard by other vessels in the same fog, disposes of the claim that some condition of the atmosphere may have prevented the witnesses on the *Bourgogne* from hearing the *Ailsa's* bell.

V.—Why, then, it is asked, were not the *Bourgogne's* whistles heard on the *Ailsa?* The answer is twofold:

(*a.*) Whistles were heard by the pilot, but amid the multiplicity of signals were not recognized as those of the *Bourgogne* (p. 62, fol. 246; p. 71, fol. 284).

(*b.*) Those on the *Ailsa*, being at anchor, were charged with no duty of discrimination between the various signals that they heard. She was bound to keep her place and ring her bell, and could do nothing more.

VI.—(1.) That the bell was rung continuously from the time the *Ailsa* anchored until the moment

of collision is proved by overwhelming testimony which the Courts below did not discredit.

Capt. Shooks, p. 60, fols. 239, 240; p. 61, fol. 242.
Capt. Morris, p. 125, fol. 500; p. 126.
Capt. Cote, first officer, p. 139, fols. 554, 555; p. 147, p. 159.
Mr. Nelson, 2d Officer, p. 161, fol. 642; p. 163, fol. 692.
Tietjens, passenger, p. 178; p. 179, fol. 714; p. 181, fols. 723, 724; pp. 182, 183.

He says: "I can positively swear all the time I "was in the cabin I could hear the bell ringing" (pp. 183, 184, fols. 732, 733).

Lazmore, purser, p. 186, fol. 741.
Pearce, passenger, Postmaster of the Island of Jamaica, p. 192, fol. 768; p. 195, fol. 780; p. 196, fol. 781; pp. 198, 199.
Smith, seaman, pp. 208-210, fols. 832-838.
Vitolani, pp. 222, 223, fols. 886-889.
Santos, pp. 227, 228, fols. 906-910.

This testimony is confirmed by the testimony of Capt. Cooley of the *Harold*, and Jaycox, engineer of the same tug. They actually heard the bell before they saw the *Ailsa*, and it guided them to that steamer just before the collision (pp. 86, 87, fols. 341-345; p. 95, fols. 378-380).

Slight discrepancies as to length of time and order of events, strengthen, rather than impair, the force of their evidence.

The bell was a good bell, of the usual size (p. 135, fol. 538), and was produced and rung on the trial (p. 437, fol. 1747; p. 159, fol. 534).

2. Mr. Murphy, the disloyal officer who goes to the other side with the proffer of his services (p. 393, fol. 1572) does not pretend to say positively that the bell was not rung. He says he was loitering around the deck, not on duty, and was talking to different people—he talked to the cooks and some of the others (p. 383, fol. 1532)—but when he was pressed he was not willing to say the bell was not rung, but said he was not paying attention (p. 386, fol. 1544).

Murphy's testimony is of little weight of itself. But it is hopelessly discredited:

(*a.*) By the uncontradicted evidence of two witnesses that he had threatened to "get even with the captain for reporting him for having lost the log on the previous voyage" (p. 428, fol. 1712; p. 431, fol. 1722).

(*b.*) By the proof from Prof. Compton's trigonometrical survey (pp. 251–253) that the place where Murphy located the wreck (pp. 425. 426) was absolutely erroneous. The Court, on the trial, observed that the discrepancy between Capt. Morris' location of the wreck (*Ailsa*, Ex. 1, pp. 115–117; p. 118, fol. 469) and that of Murphy, was too great to be accidental. Now, the former is shown to be right, and the latter to be wrong. This reinforces Morris' whole testimony, and hopelessly discredits Murphy.

3. Russell, the baker, turned up drunk at the last moment, when it was too late to supply his place (p. 438). He was called to show that shortly before the collision the bell wasn't ringing. The evidence of his intoxication was not necessary to discredit him. He swears that the bell was never rung before the collision (p. 298, fol. 1190). While Capt. Poirot (p. 306, fols. 1223, 1224) and other witnesses from the *Bourgogne* (p. 268, fol. 1071; p. 272, fol. 1086; p. 345, fol. 1380; p. 402, fol.

1608) admit that the *Ailsa's* bell was rung after they saw her and before the collision. False witnesses always overdo their testimony.

4. A similar contention has been made in other cases. But where the evidence of the officers and men of the vessel at anchor is explicit as to the ringing of the bell, the Court has attributed the failure of the steamer to hear it to other causes.

In the *Fulda*, 52 F. R., 400, the Court attributed such failure to

" the noise and commotion attendant on the navigation."

This is supported by

The *Buffalo*, 50 Fed. Rep., 630; affd. 55 F. R., 1019.

The evidence of witnesses as to what was actually done on their own vessel is entitled to more weight than negative evidence from the approaching ship, or the opinions of witnesses on the latter.

The *Grace Girdler*, 7 Wall., 196, 200.
The *Alberta*, 23 Fed. Rep., 807, 810.

Eighth.

Inevitable Accident.

The defense of inevitable accident was not sustained in the Courts below. The fact that the fog was dense and that it was impossible for the *Bourgogne* to see the *Ailsa* in time to avoid a collision does not prove inevitable accident.

This Court thus state the rule in

Union S. S. Co. vs. *N. Y. & Va. S. S. Co.*, 24 How., 307:

"Inevitable accident, as applied to cases of this description, must be understood to mean 'a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.' It is not inevitable accident * * * 'where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done.'"

S. P. *The Buffalo*, 55 F. R., 1019; affg. 50 F. R., 630.
The Oswego, 71 F. R., 537.
The Rockaway, 25 Fed. Rep., 775.
The John Adams, 1 Cliff, 404.
The Baltic, 2 Bened, 452.

Ninth.

The motion for a certiorari should be granted.

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